SUPREME COURT U. S.

SEP 12 1968

JOHN F. DAVIS, CLERK

No. 507

In the Supreme Court of the United States

OCTOBER TERM, 1968

JOHN J. PYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Your petitioner, John J. Pyne, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction for travel in interstate commerce for the purpose of carrying on an unlawful business enterprise involving extortion, in violation of Title 18, United States Code, Section 1952, in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this petition. (App. A, p. App. 1)

JURISDICTION

Judgment of the Court of Appeals was entered on July 12, 1968 (App. B, p. App. 14). A timely petition for rehearing and, alternatively, for rehearing en banc, was denied on August 14, 1968. (App. C, D, p. App. 15, 16). The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

STATUTE INVOLVED

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. * * * "

STATEMENT OF THE CASE.

The petitioner, John J. Pyne, along with two co-defendants, was indicted in May of 1967 for interstate travel from Chicago, Illinois, to Provo, Utah, on or about March 9, 1964, to promote extortion in violation of a Utah statute (Title 76, Ch. 19, Sec. 19-1 of the Utah Code), in contravention of Section 1952, of Title 18, United States Code. One defendant pleaded guilty, and petitioner Pyne and a co-defendant were found guilty after a jury trial. On appeal to the United States Court of Appeals for the Seventh Circuit, the conviction was affirmed.

The Evidence in this case taken in a light most favorable to the Government is as follows:

On February 25, 1964, Robert P. Thorn, who was in the construction business in Provo, Utah, and lived in Salt Lake City, Utah, came to Chicago, Illinois, to attend the National Ready-Mix Concrete Association Convention (R. 20). On February 27, 1964, at approximately 10:30 P.M., as he left the Schubert Theater, he was approached by an individual whom he had never seen before and whom he identified as the defendant Schwartz. Schwartz told him that he was a manufacturer's representative of heavy equipment and wanted to talk to him about his product (R. 21). The two of them went to Thorn's room at the Palmer House Hotel.

In the room Schwartz asked Thorn whether he would like to have some fun and when Thorn asked what he meant by having some fun, Schwartz suggested that they go to bed (R. 22). Schwartz then exposed himself and suggested an act of perversion. Thorn told him to leave the room or else he would call the police.

Schwartz then told Thorn that if he caused any trouble he would be in serious trouble, and he pulled out a folder containing a badge and an I.D. card and told Thorn that he was an officer of the Chicago Police Department. Thorn gave him his driver's license and plastic folder containing business cards from which Schwartz took notes and then inquired about Thorn's family.

Schwartz also told Thorn that he would be charged on a homosexual offense if anything came of this experience.

The foregoing is the only evidence in the case pertaining to activities of the defendant Schwartz, except his arrest in Camden, New Jersey where he was identified by Thorn.

On March 9, 1964, an individual came into Thorn's office at Provo, Utah, and identified himself as Sgt. Walter Duncan of the Chicago Police Department and whom Thorn identified as the defendant Edmund Pacewicz (R. 22-23). Pacewicz left Thorn's office and returned in a few minutes with another man whom he introduced as Detective John Anderson of the Chicago Police Department and whom Thorn identified as the defendant Pyne. They told Thorn that they had a warrant of arrest for his return to Chicago as a result of the experience with Schwartz in his hotel room in

Chicago. Schwartz was referred to by Pyne and Pacewicz by the name of "Dick". Pacewicz said that Schwartz was in trouble because he had not arrested Thorn on that night and that the only way he could be cleared would be for Thorn to return to Chicago and stand trial on a homosexual charge. Thorn said it would be impossible for him to return to Chicago. Pacewicz then told Thorn that if he did not return to Chicago a bond in the amount of $25,000 would have to be posted. He was later told that the Bond could be reduced to $10,000, and Thorn said that he thought he could raise this amount (R. 24).

Thorn gave the $10,000 to Pacewicz and said that he gave it to him because he was afraid to return to Chicago accused by a Chicago policeman of a homosexual charge. He said he knew that it would be difficult to prove his innocence and if he were forced to return to Chicago, his reputation and life would be ruined (R. 26).

On March 11, 1964, Thorn received a telephone call from Pacewicz, the substance of which was to reassure him that things were under control in Chicago and progressing satisfactorily (R. 27). He also received a telephone call from Pyne on April 13, 1964, advising him that the case had been continued to July 9, and that everything would be straightened out by then (R. 29). The origin of the telephone call was not proven. Tape recordings of both of these telephone conversations were played to the jury over defense objections. All of the foregoing evidence was from the witness Thorn.

On cross-examination Thorn testified that he had been shown numerous photographs by agents of the F.B.I. in an effort to identify Schwartz (R. 23). Counsel for defendants requested that all photographs shown Thorn be turned over to counsel. However, the court directed that only the photographs identified by Thorn be turned over to counsel.

A Chicago police officer testified that he could find no records pertaining to an arrest warrant for Robert Paul Thorn (R. 38). Another officer stated that the records of the Chicago Police Department contained no records of a Sergeant Walter Duncan, and the only records pertaining to an Officer John Anderson were those of a Negro (R. 38).

An Avis Rent-A-Car clerk identified Pacewicz as the individual who signed a rental agreement on March 8, 1964, at the Salt Lake City Airport (R. 31). She also identified Pyne as being in the vicinity of the Avis counter at the time the agreement was signed (R. 32).

The defense presented no witnesses and their motions for judgment of acquittal were denied (R. 33).

QUESTIONS PRESENTED

1. Did not the Court of Appeals err in holding that an uncorroborated admission of a defendant to the Government's principal witness was sufficient, not only to sustain conviction, but also to prove "corpus delicti".

2. Did not the Court of Appeals err in holding that the burden of proving the most essential element of the offense, and in fact the "corpus delicti", to wit: interstate travel, shifted to the defendants, the Government once having shown by an uncorroborated admission that the defendants could have come from Chicago, Illinois, to Provo, Utah.

3. Did the Congress in enacting 18 U.S.C. 1952, intend that criminal prohibitions of the fifty States, without control by the Congress, exert a potential fluctuation criminal proscription on citizens of the various states in violation of the Sixth Amendment to the Constitution of the United States?

4. Did not the trial court err, in modifying the key defense instruction that the state offense could have been an offense other than extortion, by telling the jury that "you have to find" that the object of the interstate commerce "was extortion; not obtaining money under false pretentions or false impersonation of an officer or police official"?

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Seventh Circuit, that not only a conviction but proof of the corpus delicti can rest upon an uncorroborated admission by the petitioner to the principal Government witness, is contrary to the decision of this Court in *Wong Sun* v. *United States,* 371 U.S. 471.

2. The decision of the United States Court of Appeals for the Seventh Circuit that the burden of proof of the corpus delicti of the offense shifts to the defendant is contrary to this Court's decision in *Morrison* v. *California,* 291 U.S. 82, 88-91 and many other cases of other Circuits of the United States Courts of Appeals, that the burden of proof of an essential element of the crime never shifts.

3. Should not this Court exercise its power of supervision to examine the unconstitutional extension of federal jurisdiction over local matters which may not, consistent with the guarantees of the Constitution, be upheld. Stated otherwise, can a Federal Statute depend on the variant views of fifty States in their definition of local crime impose upon citizens of the several States fluctuating criminal proscriptions in their constitutional access to the channels of interstate commerce. (*Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 U.S. 311; and *Cf. U. S.* v. *Nardello,* No. 51, October Term 1967 (36 U.S. Law Week 3483) probable jurisdiction noted and case placed on the summary calendar for October, 1968.

4. Should not this Court exercise its power of supervision where the lower courts have so far departed from the accepted and usual course of judicial proceedings by

sanctioning the modification of an instruction embodying the theory of the defense of the petitioner's request and thereby direct the jury to reject petitioner's defense in contravention of the Sixth Amendment to the Constitution of the United States.

1.

In order for this Court to understand one of the contentions of the petitioner, the following relates to the evidence (or lack of it) on interstate commerce. The Court of Appeals conceded, as it must, that there was no independent proof of travel from Chicago, Illinois, to Provo, Utah, on March 9, 1964. The interstate travel from Chicago to Provo, Utah, constituted the basis for venue in Chicago, Illinois, as well as the *corpus delicti* of the crime. This was a prosecution for *interstate travel* to promote the commission of Utah law, to wit, extortion. The *corpus delicti* is interstate travel. The only evidence that Pacewicz or Pyne came from Chicago, was by way of the uncorroborated testimony of the victim, Thorn, that the defendants *said* they were Chicago police officers who had come from Chicago and who were planning to return to Chicago. The evidence showed that Pacewicz and Pyne rented an Avis car at the Salt Lake City Airport. At that time, Pacewicz produced a New Jersey drivers license, correctly stating his residence and employer to be in the State of New Jersey.

There was no proof as to where Pyne came from. He was arrested in Chicago two years after the offense. Pacewicz and Schwartz were arrested in New Jersey. Everything that Pacewicz and Pyne told the victim, Thorn, in Utah was a falsehood. They falsely represented themselves to be Chicago police officers Duncan and Anderson; they falsely represented that a complaint had been filed; they falsely represented they had a warrant which had

been issued in Chicago; they falsely represented that Schwartz was in trouble as a young police officer who failed to report the hotel room incident; so that out of all this fabrication, their statement that they came from Chicago and had to return to Chicago was accepted by the lower courts as a basis for the laying of venue in Chicago, Illinois, and proof of the corpus delicti. The "admission" was accepted from the parcel of lies as truth and it was completely uncorroborated.

The foregoing is directly contrary to a decision of this Court in *Wong Sun* v. *United States,* 371 U.S. 471, as follows:

> "One line of our decisions establishes that criminal confessions and admissions of guilt require extrinsic corroboration; * * *
>
> "It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused. We observed in Smith v. United States, 348 U.S. 147, 153, 75 S.Ct. 194, 197, 99 L.Ed. 192, that the requirement of corroboration is rooted in 'a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.'" *Wong Sun* v. *United States,* 371 U.S. 471.

The decision of the case at bar is even contrary to the reviewing court's own holding:

> "A conviction cannot rest upon a confession unless it is corroborated by evidence establishing the *corpus delicti.* To this effect, defendants' counsel cite Forte v. U. S., 68 App.D.C. 111, 94 F.2d 236, 127 A.L.R. 1120, and the government cites Manning v. U. S., 10 Cir., 215 F.2d 945.

> "Most American courts take the view that the phrase '*corpus delicti*' includes first, the fact of an injury or a loss and secondly, the fact of somebody's criminality (in contrast *e.g.* to accident) as the cause of the injury or loss. The proof of these two elements involves the commission of a crime by somebody. But the phrase '*corpus delicti*' does not include the fact of the connection of the accused with the crime—his identity as the criminal, or the guilty agent through whom the wrong has occurred. Manning v. U. S., 215 F.2d 945, at page 947." *United States* v. *Echeles,* (C.A. 7) 222 F.2d 144.

The Ninth Circuit Court of Appeals has held as follows:

> "With reference to the second count, the charge is that the appellant falsely represented himself to be a citizen of the United States without having been duly admitted to citizenship, etc., in violation of 18 USCA Sec. 141. In order to establish this charge it is not only necessary for the prosecution to show that the appellant was not born in Camden, N.J., but also to show that he was not a citizen of the United States. There is no evidence to establish that fact other than the admissions of the appellant as hereinbefore stated. These were insufficient to prove the corpus delicti." *Duncan* v. *United States,* 68 F.2d 136.

2.

The reviewing Court, in addition to ruling contrary to longstanding authority establishing that criminal admissions require extrinsic corroboration and that a conviction must rest on firmer ground than an uncorroborated admission, went much further.

The Court of Appeals also shifted the burden of proof to the defendants. It so happened that by shifting the burden to the defendants, it placed upon them the burden of proof of venue, because without the interstate travel from

Chicago, Illinois, the Court had no jurisdiction. The Court of Appeals held as foliows:

> Much of what Pyne and Pacewicz told Thorn was false, to be sure, but there is nothing inherently incredible, even in retrospect, about these particular statements. In effect, defendants are asking that the admissions be disregarded because they were surrounded with lies. *Pyne and Pacewicz know the departure point of their Salt Lake City trip.* Therefore, there is nothing unfair about giving their admissions the same weight as those of less mendacious persons.
>
> From the foregoing evidence, the jury could conclude that Pacewicz and Pyne had come from Chicago on March 8. The Government at least *proved enough to shift the burden of proof to defendants. Morrison* v. *California,* 291 U.S. 82, 88-91. (Emphasis supplied)

The Government's initial burden is to present proof of every essential element of the crime charged. *United States* v. *Hoyland,* 7 Cir., 1959, 264 F.2d 346, certiorari denied 361 U.S. 845, 80 S.Ct. 98, 4 L.Ed.2d 83. The accused only carries the burden of going forward by proving facts which relate to him personally, especially when those facts are relied upon by him as justifying or excusing an otherwise criminal act. *McPhaul* v. *United States,* 1960, 364 U.S. 372, 379, 81 S.Ct. 138, 5 L.Ed.2d 136; *Taylor* v. *United States,* 8 Cir., 1927, 19 F.2d 813; *Williams* v. *United States,* 5 Cir., 1948, 170 F.2d 319, 322, certiorari denied 335 U.S. 909, 69 S.Ct. 412, 93 L.Ed. 442; *Jencks* v. *United States,* 5 Cir., 1955, 226 F.2d 540, reversed on other grounds 1957, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed. 1103. The prosecution always has the burden of proving guilt beyond a reasonable doubt and this burden never shifts (*Leland* v. *State of Oregon,* 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302, rehearing denied 344 U.S. 848, 73 S.Ct. 4, 97 L.Ed. 659; *United States* v.

Indian Trailer Corp., 7 Cir., 1955, 226 F.2d 595; *United States* v. *Fenwick*, 7 Cir., 1949, 177 F.2d 488; *United States* v. *Morley*, 7 Cir., 1938, 99 F.2d 683, certiorari denied 306 U.S. 631, 59 S.Ct. 463, 83 L.Ed. 1033; *Duncan* v. *United States*, 7 Cir., 1927, 23 F.2d 3).

The Court of Appeals for the Seventh Circuit relied upon *Morrison* v. *California*, 291 U.S. 82, 88-91, as authority for its holding. As respects the shift of the burden of going forward in a criminal prosecution to the defendant (*Morrison* v. *California*, 291 U.S. 82, 88, 90-91, 54 S.Ct. 281, 284, 285), Mr. Justice Cardozo said, by way of dictum, "For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance * * * or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge * * *." Id., 291 U.S. 90-91, 54 S.Ct. 285. Whatever may be the reach of that dictum, it was not adequate to sustain a conviction in that case and is inadequate here. That case involved a charge of conspiracy to violate the alien land law of California. A citizen, charged as co-conspirator, was convicted on a presumption that he knew of the disqualification of his co-conspirator alleged to be an alien. The holding of the Court was that invocation of the presumption against the citizen denied him due process. Id., 291 U.S. 93, 54 S.Ct. 286. The alien was not a conspirator, "however guilty his own state of mind," unless the citizen "shared in the guilty knowledge and design." Therefore, said Mr. Justice Cardozo, "The joinder was something to be proved, for it was of the essence of the crime." Id., 291 U.S. 93, 54 S.Ct. 286. That ruling rests on the presumption of innocence that is never overcome unless the prosecution introduces some competent evidence implicating the accused in the criminal act that is charged.

The Court of Appeals below relied on *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U.S. 311. A reading of the *Clark Distilling Co.* case discloses that the Congress there was dealing with intoxicating liquors and the various laws of the States which had adopted restrictions on their shipment. The Supreme Court pointed out that the Congress had authority directly to pass laws relating to intoxicating liquors and that a lesser exercise of power under the Webb-Kenyon Law, which was under consideration in that opinion, did not make unconstitutional a law over a subject to which a far greater control could have been applied.

The Court in its opinion recognized that the subject, itself, was a justification for the lesser exertion of legislation. The Court did point out, however, at page 332 as follows:

> "The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the Constitution but for the enlarged right possessed by government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that *such power may be constitutionally extended to things which it may not*, consistently with the guaranties of the Constitution, *embrace.*" *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U.S. 311. (Our emphasis)

The "exceptional nature" of the subject in the *Clark* case cannot be equated with local offenses (in the case at

bar—extortion), which constitutionally are reserved to the State. The inescapable argument still remains that the criminal prohibitions of the fifty states without processes of repeal or amendment or any other control by the Congress, exerts a potential fluctuating criminal proscription that the Congress in enacting the statute never thought of and could never have anticipated.

This Court should exercise its power of supervision to decide an important question of federal law which has not been, but should be, settled by this Court.

4.

The Petitioner below had attacked the constitutionality of Section 1952, Title 18, United States Code, on the ground that the criminal prohibitions of the fifty states, without processes of appeal or amendment by the Congress, exerts a potential fluctuating criminal proscription that the Congress, in enacting the statute, never thought of nor can control. In the case at bar, the trial court took judicial notice of the laws of the State of Utah. Extortion under the Utah code, Chapter 19, Section 19-1 of Title 76, is in relevant part:

> "Extortion is the obtaining of property from another with his consent induced by a wrongful use of force or fear." (R. 57)

The trial court also instructed the jury based on the Utah statutes as follows:

> "Another statute which defines fear such as will constitute extortion is fear which can be induced by a threat to accuse a person or any relative of his or any members of his family with any crime. That is a permissible fear for purposes of extortion. (R. 58)."

The petitioner, in his defense, arguably demonstrated that the facts in the case at bar could give rise to a violation of another statute. The defendant, under his theory of the case, tendered Pyne Instruction V, reading as follows:

> "There is a statute in the State of Utah which defines extortion as the obtaining of property from another with his consent induced by a wrongful use of force or fear * * * There is another statute which defines fear such as will constitute extortion can be induced by a threat to accuse a person or any relative of his or member of his family with any crime. There is also a statute in the State of Utah which defines obtaining money by false pretense. It is as follows: Every person who knowingly and designedly, by false or fraudulent representations or pretenses obtains from any other person any * * * money * * *, with intent to cheat or defraud any person of the same * * * is punishable, etc.
>
> It is also an offense in the State of Utah to impersonate an officer and thereby in such pretended character obtain any money.
>
> If you find from the evidence that the defendants did not commit the crime of extortion but rather the crime or crimes involving false pretenses or false personation, then you must find the defendants not guilty. In other words, ladies and gentlemen, in addition to the element of interstate travel with specific intent, the element of extortion must be proven beyond a reasonable doubt. If you have a reasonable doubt as to whether or not extortion was committed, then you must find the defendants not guilty."

The trial court in adapting the request, and charging the jury stated as follows: (App. 59)

> "You *have to find* from the evidence that the object or purpose of the interstate commerce, if you find there was such interstate commerce, interstate

transportation, was extortion; not obtaining money under false pretenses or false impersonation of an officer or public official.

"I made it clear to you that that is an essential element of extortion as distinguished—and Mr. Calihan argued it vigorously—that extortion as distinguished from obtaining money under false pretenses or obtaining money by false impersonation of an officer is an essential element of this case, and it is." (Emphasis added)

Proper objection was made to the modification of this instruction.

"Mr. Calihan: Your Honor said it in this fashion, that it was not charged here, and then you said but you are going to have to find them guilty of extortion. I don't know if that was a command." (Tr. 535-536)

Thus the Court directed the jury to find extortion in the following words:

"You *have to find* from the evidence that the object or purpose of the interstate commerce • • • was extortion; not obtaining money under false pretenses or false impersonation of an officer or public official." (Emphasis added)

The Court then went on to say:

"I made it clear to you that that is an essential element of extortion as distinguished • • • from obtaining money under false pretenses."

The instruction *as tendered* stated that if the jury found that the defendants did not commit the crime of extortion but rather the crime or crimes involving false pretenses or false impersonations, then the jury must find the defendants not guilty. The issue was squarely pre-

sented to the jury in this instruction that if they had a reasonable doubt as to whether or not extortion was committed then they must find the defendants not guilty.

It should be made clear that what the petitioner raised as error below was the portion of the instruction where the District Judge modified Pyne Instruction V. The first paragraph of that instruction was given as tendered (R. 58-59). It was only the last paragraph of said instruction which was modified to the extent that it could be interpreted as a command to the jury. Proper objection was made pursuant to Rule 30 of the Federal Rules of Criminal Procedure.

CONCLUSION

Wherefore, for the above and foregoing reasons, the petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
Attorney for Petitioner.

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 — APRIL SESSION, 1968

Nos. 16465, 16466
UNITED STATES OF AMERICA
Plaintiff-Appellee,
v.
ROBERT SCHWARTZ and JOHN J. PYNE,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 12, 1968

Before CASTLE, *Chief Judge,* and FAIRCHILD and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In May 1967, Edmund Pacewicz and defendants John Pyne and Robert Schwartz were indicted for interstate travel (or causing interstate travel) from Chicago to Provo, Utah, on or about March 9, 1964, to promote extortion in violation of a Utah statute,[1] in

[1] Title 76, Ch. 19, Section 19-1 of the Utah Code, which provides:
"Extortion is the obtaining of property from another with his consent induced by a wrongful use of force or fear."
Defendants do not argue that this case does not involve extortion under that provision of the Utah Code. Therefore, *United States* v. *Nardello,* No. 51, October Term 1967, in which the Supreme Court recently noted probable jurisdiction (36 U.S. Law Week 3483), is not applicable.

contravention of Section 1952 of the Criminal Code (18 U.S.C. § 1952). Pacewicz entered a plea of guilty, and defendants Pyne and Schwartz were found guilty after a jury trial.

The evidence showed that on February 25, 1964, Robert P. Thorn, a resident of Salt Lake City, Utah, came to Chicago to attend the National Ready-Mix Concrete Association convention. Thorn was in the construction business in Provo, Utah. On February 27, Thorn attended meetings of the convention and then attended an evening performance of *How to Succeed in Business Without Really Trying* at the Shubert Theatre. On the lapel of his suit he was wearing a convention tag describing him in block letters as follows:

ROBERT P. THORN
THORN ROCK PRODS. CO.
PROVO, UTAH

As he left the theatre at approximately 10:30 p.m., defendant Schwartz, who was standing outside the theatre, hailed Thorn by name. Schwartz explained that he was a manufacturer's representative of heavy equipment and wanted to talk to Thorn about his product. Thorn invited Schwartz to Thorn's room at the Palmer House Hotel to discuss this business.

A moment after their arrival in Thorn's room, Schwartz solicited an act of perversion. Thorn immediately ordered Schwartz to leave the room, stating that otherwise he would call the police.

Schwartz then told Thorn that he would be in serious difficulties if he caused any trouble. Schwartz pulled out a folder containing a badge and an I.D. card and told Thorn he was an officer of the Chicago Police Depart-

ment. Thorn then gave Schwartz his driver's license in a plastic folder containing his business cards. Schwartz took notes from these items and asked Thorn for his business address, the number and ages of his children and information about his automobile and about his wife's automobile.

Schwartz told Thorn that a serious criminal charge would be lodged against him if anything came of this experience. He also told Thorn that his family and business reputation would suffer if he were so charged.

On February 28, Thorn returned to Utah without having called the Chicago Police Department.

On March 9, defendant Pacewicz, calling himself Sergeant Walter Duncan of the Chicago Police Department, appeared at Thorn's office in Provo, Utah. After a 15-or 20-minute conversation, Pacewicz left Thorn's office. A few minutes later, he returned with defendant Pyne, who was introduced as Detective John Anderson of the Chicago Police Department. Pacewicz termed Anderson "a close friend of the father of the young officer" (defendant Schwartz, whom they called Dick) who had visited Thorn's Chicago hotel room. The defendants indicated that Schwartz's father had long been a detective in the Chicago Police Department.

The defendants told Thorn they had a warrant of arrest for his return to Chicago as a result of the Palmer House episode. Pacewicz exhibited papers purportedly for Thorn's arrest and extradition to Illinois. They said that Schwartz was in trouble for not having arrested Thorn, and that Schwartz could only be cleared if Thorn returned to Chicago to stand trial. Thorn said that it would be impossible to do so. Pacewicz said they were

obliged to produce Thorn in Chicago or else he would have to post a $25,000 bond. When Thorn advised defendants that he could not raise this amount, Pacewicz said the bond could be reduced to a $10,000 cash bond, resulting in vindication of Schwartz and Thorn. Defendants told Thorn they had to return to Chicago as early as possible.

Later that morning, Thorn gave Pacewicz an envelope containing $10,000 because Thorn was afraid to return to Chicago to face Schwartz's charges. Thorn never recovered this money although Pacewicz had promised its return, less a 10% Illinois bondsman's fee.

Two days later, Pacewicz telephoned Thorn to tell him they would keep everything under control and that the matter would be disposed of in three or four months. In this conversation, Pacewicz refused to give Thorn his business or home telephone number and explained that he was calling on an outside phone to avoid a monitor. He said the case had been continued until a hearing ten or twelve days thence, and they would secure another continuance for 30-45 days. He reported that he had succeeded in straightening out "these two boys" so that everyone felt pretty good about the whole thing "back here."

About a month thereafter, Pyne telephoned Thorn to tell him that they (Pyne and Pacewicz) had gone to court that day and the case had been continued until July 9, and that everything would be straightened out by then.

Both these telephone calls were transcribed. The tape of the March 11th call from Pacewicz to Thorn shows that it was a person-to-person long distance booth call

costing $2. The tape of the April 13th call from Pyne to Thorn shows that it was a long distance call from a booth. The tape recordings were played to the jury, but the Court advised the jury that the conversation between Pacewicz and Thorn was not then admissible against Schwartz. The Court also instructed the jury that, absent a common plan, no testimony was applicable to a defendant unless he was present.

On cross-examination, Thorn testified that he had been shown 40 photographs by Federal Bureau of Investigation agents in the latter part of March in Provo, Utah, in an effort to identify Schwartz. Thorn selected a front pose and a profile pose from these photographs.[2] Since the 40 photographs had not been retained together, the District Court ruled that Schwartz's counsel was entitled to see only the two poses that Thorn had identified as Schwartz. In the jury's presence, the district judge asked Government counsel whether these two pictures were retained and were available in Chicago, and FBI agent Cavanaugh replied:

> "Yes, sir. They were identified with police numbers and I can get them downstairs [at the FBI headquarters in Chicago], or copies, which are the only photographs available on that P.D. number."

Thereupon, outside the presence of the jury, defense counsel moved unsuccessfully for a mistrial.

A Chicago police sergeant testified that he had been unable to find any arrest warrant for Thorn. Another Chicago police officer stated that there were no Police

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[2] Thorn positively identified Schwartz outside the United States Commissioner's room in the United States Courthouse in Camden, New Jersey, in September 1966.

Department records as to a Sergeant Walter Duncan nor as to a caucasian Detective John Anderson.

FBI agent Kotsos testified that after arresting defendant Pyne in his residence at 10458 South Claremont Avenue in Chicago on June 24, 1966, he searched the residence as an incident to the arrest and discovered two blank Chicago Police Department cards, one for a sergeant and one for a detective.

A Salt Lake City, Utah, Avis Rent-a-Car clerk identified Pacewicz as the man who rented a Ford car from her at the Salt Lake City airport on March 8, 1964, at 9:15 p.m., returning it at 2:00 p.m. on March 9. She identified Pyne as being in the vicinity of the Avis counter at the time the car rental agreement was signed.

Another FBI agent testified that the signature on the Avis rental agreement was that of defendant Pacewicz.

Constitutionality of Federal Statute

Defendant Pyne complains that Section 1952 of the Criminal Code (18 U.S.C. § 1952)[3] violates the Fifth

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[3] Section 1952 prescribes a $10,000 maximum fine or 5 year maximum imprisonment, or both, for

"(a) Whoever travels in interstate * * * commerce, * * * with intent to —

"(3) * * * promote, manage, establish, [or] carry on * * * any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraph[s] * * * (3) * * *.

"(b) As used in this section 'unlawful activity' means * * * extortion * * * in violation of the laws of the State in which committed or of the United States."

* * * * *

Amendment because it incorporates state statutes that vary throughout the United States. The same argument was rejected in *Turf Center, Inc.* v. *United States,* 325 F.2d 793, 795-796 (9th Cir. 1963) and in *Spinelli* v. *United States,* 382 F.2d 871, 890 (8th Cir. 1967), certiorari granted, 390 U.S. 942.[4] We agree with the 8th and 9th Circuits that Section 1952 does not violate the Fifth Amendment even though there is a lack of uniformity among the state laws upon which it depends. See *Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 U.S. 311.

Interstate Travel

The defendants argue that there was insufficient evidence to warrant the jury finding that Pacewicz and defendant Pyne had traveled from Chicago to Provo, Utah, on March 8, 1964. Although no direct proof of travel was shown, there was evidence from which the jury could conclude that such an interstate journey had occurred.

The evidence shows that Pacewicz and Pyne rented an Avis car at the Salt Lake City airport on the evening of March 8, and that they conferred with Thorn in his Provo office the following morning. At that conference, they described themselves and Schwartz as representatives of the Chicago Police Department and told Thorn they had to return to Chicago as soon as possible. They indicated that they had come from Chicago on official business—either to "produce [Thorn's] body [to stand trial in Chicago] or a bond of $25,000." After they had obtained the $10,000 from their victim, they returned the rented car at the Salt Lake City airport at 2:00 p.m. on March 9. By thus indicating that they had come from and were

[4] The constitutionality of this statute was not raised in the petition for certiorari.

going to return to Chicago, Pyne and Pacewicz made admissions against their interests. Although such admissions are ordinarily enough to take an issue to the jury, defendants argue that the admissions did not create a jury question because they were made in the course of a deceptive presentation. Much of what Pyne and Pacewicz told Thorn was false, to be sure, but there is nothing inherently incredible, even in retrospect, about these particular statements. In effect, defendants are asking that the admissions be disregarded because they were surrounded with lies. Pyne and Pacewicz know the departure point of their Salt Lake City trip. Therefore, there is nothing unfair about giving their admissions the same weight as those of less mendacious persons.

From the foregoing evidence, the jury could conclude that Pacewicz and Pyne had come from Chicago on March 8. The Government at least proved enough to shift the burden of proof to defendants. *Morrison* v. *California,* 291 U.S. 82, 88-91.

Instructions

All told, five instructions of the District Court have been assailed on appeal. Both defendants complain that it was improper for the word "assuming" to be used in the following two portions of the charge to the jury:

> "The first thing we do, of course, when a witness takes the stand is administer the oath to him. He swears to tell the truth. Based on this we start out, at least, *assuming* that the witness is going to speak the truth. This assumption may be outweighed by a lot of factors: the manner in which the witness testifies, by the character of the testimony which he or she gives or by contradictory evidence given by other witnesses.
>
> * * * * *
>
> "In weighing the testimony of witnesses, I told you we start out *assuming* because they take an oath

> that the witness is going to tell the truth. This assumption may be outweighed by a lot of factors—the manner and demeanor on the stand, the extent to which their testimony is contradicted by other testimony or other evidence, the extent to which they may be involved or affected by the case, or any other factor; that you are not simply to assume because there are some discrepancies that that means the witness is not believable because we know people's recollections are imperfect, different people see different situations differently at the time, so you are going to have to decide whether discrepancies indicate reliability or unreliability, deliberate misstatement of the facts or accident failure of recollection or lack thereof." (Emphasis supplied.)

As in *United States* v. *Roviaro,* 379 F.2d 911, 915 (7th Cir. 1967), no case was cited in which the giving of such an instruction was the basis of reversal. The instruction given here was different from the presumption of credibility instructions disapproved in prior cases. In those cases the court stated that the testimony given was presumed to be true in the absence of contrary indications. In contrast, this instruction states that before he gives any testimony, a witness can be expected to tell the truth. It is obviously improper to start out with the expectation that a witness will violate his oath. This instruction attaches to the oath the value which experience dictates it should have. It was based on a revised charge of Judge Mathes,[5] and the explanation following the charge "made

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[5] Mathes and Devitt, *Federal Jury Practice and Instructions* (1965), No. 72.01 provides:

> "Ordinarily, it is assumed that a witness will speak the truth. But this assumption may be dispelled by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by the evidence to the contrary of the testimony given."

it clear that the jury for a variety of reasons could disbelieve an uncontradicted witness", so that there was no reversible error. *United States* v. *Bilotti*, 380 F.2d 649, 656 (2d Cir. 1967), certiorari denied, 389 U.S. 944.

After giving a revised version of Pyne instruction V, the trial court told the jury as follows:

> "*You have to find* from the evidence that the object or purpose of the interstate commerce, if you found there was such interstate commerce, interstate transportation, was extortion; not obtaining money uner false pretentions or false impersonation of an officer or public official." (Emphasis supplied.)

Pyne asserts that the underscored language directed the jury to find extortion. Read in context, it is clear that the District Court was telling the jury that it could not convict unless the jury found that the purpose of the interstate travel was extortion, as alleged in the indictment, rather than obtaining money under false pretentions or through false impersonation of an officer, as proscribed by other Utah statutes. In reality, the district judge was merely instructing the jury as to defendants' theory of the case. Cf. *Roe* v. *United States*, 287 F.2d 435, 440 (5th Cir. 1961), certiorari denied, 368 U.S. 824; *Bryan* v. *United States*, 373 F.2d 403, 407 (5th Cir. 1967). The instruction did not state that extortion had been proved as a matter of law.

Defendant Schwartz objects to the following instruction:

> "In this connection, you understand that the law logically permits you to infer that a person ordinarily intends the natural and probable consequences of acts which he does or fails to do, statements which he makes, and so forth."

This instruction was taken from Sec. 4.06 of the Mathes jury instructions (27 F.R.D. 39, 78 (1960)). This single sentence has been isolated from nine paragraphs of the charge with respect to intent. Considered as a whole, the detailed instructions on intent could not have been prejudicial, especially since, under the common plan found, the evidence of intent to extort was strong. See *United States* v. *Levi,* 177 F.2d 827, 830, 831 (7th Cir. 1949); *United States* v. *Largo,* 346 F.2d 253, 256 (7th Cir. 1965), certiorari denied, 382 U.S. 904; *United States* v. *Roviaro,* 379 F.2d 911, 914 (7th Cir. 1967).

Defendant Schwartz did not testify nor present any witnesses. He complains that the District Court should not have instructed the jury that he had an absolute right not to take the witness stand. Such an instruction is considered to be helpful rather than prejudicial to a defendant. *United States* v. *Garguilo,* 310 F.2d 249, 252 (2d Cir. 1962); *United States* v. *Kelly,* 349 F.2d 720, 769 (2d Cir. 1965), certiorari denied, 384 U.S. 947. It was not reversible error to refuse to allow Schwartz to forego the benefit of Section 3481 of the Criminal Code (18 U.S.C. § 3481) ensuring his right not to testify. *Windisch* v. *United States,* 295 F.2d 531, 533 (5th Cir. 1951).

The final instruction assailed by Schwartz relates to aiding and abetting. Schwartz claims that the Court should have coupled thereto a limiting instruction to the effect that the jury could only consider the evidence as to the particular defendant's own conduct. No such limiting instruction was requested by Schwartz, and the point may not now be considered. Rule 30 of the Federal Rules of Criminal Procedure; *United States* v. *Povenzano,* 334 F.2d 678, 691 (3d Cir. 1964), certiorari denied, 379 U.S. 947. Moreover, the District Court's aiding and abetting instruction told the jury that the defendant would not be guilty as an aider and abettor unless he "willfully

seeks by some action of his to make it [the criminal venture] succeed." Immediately thereafter, the Court equated aiding and abetting with association in a common plan, and the common plan instructions contained the very limitation now sought by Schwartz. The instructions and trial transcript were also replete with admonitions that only Schwartz's own acts and declarations could be considered as evidence against him unless the jury should find he was a member of a common plan. In this setting, the Court's aiding and abetting instructions were neither confusing nor misleading.

Reference to Schwartz's Photographs

In an effort to satisfy defense counsel's request for production of front pose and profile pose photographs that Thorn had identified as Schwartz in late March 1964, the District Court inquired of the Assistant United States Attorney whether these photographs had been retained and were available. FBI agent Cavanaugh, who was seated at the Government counsel table, responded:

> "Yes, sir. They were identified with police numbers and I can get them downstairs [in the Chicago headquarters of the FBI], or copies, which are the only copies based on that P.D. number."

Defendant Schwartz argues that this one reference to "police numbers" implied that he had been previously arrested for a criminal offense, thus undermining his right to a fair trial. There is no claim that the FBI agent deliberately volunteered this information in order to prejudice the jury against Schwartz. There is no showing that the police numbers referred to any arrest of Schwartz except for the instant offense.

In *United States* v. *Dichiarinte,* 385 F.2d 333 (7th Cir. 1967), we recently rejected a similar argument and dis-

tinguished *United States* v. *Reed*, 376 F.2d 226 (7th Cir. 1967), because "there the offensive testimony was that a photograph of defendant had been taken in prison, thus directly asserting a prior conviction of crime." (See 385 F.2d at p. 337). As in *Dichiarinte*, there was no testimony here that these photographs were taken in prison, nor was there any showing that Schwartz had been previously connected with a crime. Furthermore, in *Reed* the "mug shot" references were aggravated by testimony that he was an escaped convict. Given the innocuous, unintentional nature of the Cavanaugh incident, the District Court was clearly right in not granting a mistrial.

Sufficiency of the Evidence as to Schwartz

Schwartz claims that there was no proof connecting him to the offense charged, stating that the record fails to show that he ever saw Pyne or Pacewicz prior to the trial. However, at the Palmer House meeting between Schwartz and Thorn, Schwartz made notes as to Thorn's business address, number and ages of children and information about his and his wife's cars. Some of this information, as well as an account of the Palmer House incident, must have been transmitted to Pyne and Pacewicz in order for them convincingly to stage the Provo extortion on March 9. Not only could the jury infer that Pyne and Pacewicz had obtained vital information from Schwartz, but it was also inferable that it was part of their joint plan to have Pyne and Pacewicz travel to the victim's home town in an effort to extort money from him.

The judgment is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Friday, July 12, 1968

Before

Hon. LATHAM CASTLE, *Chief Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ROBERT SCHWARTZ *and* JOHN J. PYNE, *Defendants-Appellants.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 16465, 16466	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, August 14, 1968

Before

Hon. LATHAM CASTLE, *Chief Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN J. PYNE, *Defendant-Appellant.* No. 16466	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, August 14, 1968

Before

Hon. LATHAM CASTLE, *Chief Judge*

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Hon. JOHN S. HASTINGS, *Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. OTTO KERNER, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN J. PYNE, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 16466	

IT IS ORDERED by the Court, En Banc, that the petition for rehearing en banc in this cause be and the same is hereby denied.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typed pages contain a true copy of

The opinion filed July 12, 1968

The judgment order entered July 12, 1968

The order denying the petition for hearing entered August 14, 1968

The order denying the pet. for rehearing en banc entered August 14, 1968

Cause No. 16466

United States of America, Plaintiff-Appellee

vs.

John J. Pyne, Defendant-Appellant

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 24th day of August A. D. 1968.

(Seal)

Kenneth J. Carrick
Clerk of the United States Court of Appeals
for the Seventh Circuit.
John M. Fanning
Deputy

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 507

JOHN J. PYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner and co-defendant Schwartz were convicted under 18 U.S.C. 1952 of traveling from Chicago, Illinois, to Provo, Utah, to promote extortion in violation of the laws of Utah.[1]

1. The evidence showed that in February of 1964, Robert P. Thorn, a businessman from Provo, Utah,

[1] A second co-defendant, Pacewicz, pleaded guilty.

came to Chicago to attend a business convention. After a day's meetings he attended an evening performance of *How to Succeed in Business Without Really Trying*. On the lapel of his suit he was wearing a convention tag which listed, in block letters, Thorn's name, company, and business address.

As he left the theatre at approximately 10:30 p.m., co-defendant Schwartz, who was standing outside the theatre, hailed Thorn by name. Schwartz explained that he was the representative of a manufacturer of heavy equipment and wanted to talk to Thorn about his product. Thorn invited Schwartz to Thorn's room at the Palmer House Hotel to discuss this business.

A moment after their arrival in Thorn's room, Schwartz exposed himself and solicited an act of perversion. When Thorn immediately ordered Schwartz to leave the room Schwartz told him that he (Thorn) would be in serious difficulties if he caused any trouble. Schwartz produced a folder containing a badge and an I.D. card and told Thorn he was an officer of the Chicago Police Department. Upon demand, Thorn then gave Schwartz his driver's license in a plastic folder containing his business cards. Schwartz took notes from these items and asked Thorn for further details on his business and personal life, and warned him that a serious criminal charge would be lodged if anything came of this incident. He also told Thorn that his family and business reputation would suffer if he were so charged.

The next day, Thorn left Chicago and returned to Utah.

Ten days later, defendant Pacewicz, calling himself "Sergeant Walter Duncan" of the Chicago Police Department, appeared at Thorn's office in Provo, Utah. A few minutes later, Pacewicz brought petitioner into the office, identifying him as "Detective John Anderson" of the Chicago Police Department, "a close friend of the father of the young officer" (Schwartz) who had visited Thorn's Chicago hotel room.[2]

Petitioner and Pacewicz told Thorn they had an arrest warrant for his return to Chicago as a result of the episode at his hotel, and they exhibited papers purportedly for Thorn's arrest and extradition to Illinois. They said that Schwartz was in trouble for not having arrested Thorn, and that Schwartz could only be cleared if Thorn returned to Chicago to stand trial. When Thorn protested, Pacewicz responded that they were obliged to produce Thorn in Chicago or to obtain a $25,000 bond from him. They told Thorn they had to return to Chicago as early as possible, and finally agreed to a $10,000 cash bond. Later that morning, Thorn gave Pacewicz an envelope containing $10,000.

Two days later, Pacewicz telephoned Thorn to tell him they would keep everything under control and that the matter would be disposed of in three or four months. He reported that he had succeeded in straightening out "these two boys" so that everyone felt pretty good about the whole thing "back here."

About a month thereafter, petitioner telephoned Thorn to tell him that they (petitioner and Pacewicz) had gone to court that day and the case had been con-

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[2] It was later established that these identities were fictitious, and that no complaint was ever issued for Thorn's arrest.

tinued until July 9, and that everything would be straightened out by then.

Both of these telephone calls were transcribed, and the tapes revealed that both were long-distance calls placed from a booth.

Petitioner was subsequently arrested by the FBI at his residence in Chicago, and a search incident to the arrest uncovered two blank Chicago Police Department identification cards, one for a sergeant and one for a detective.

At trial, in addition to the foregoing, the government established that Pacewicz rented a car at the Salt Lake City airport on the evening before the confrontation at Thorn's office and returned it within a few hours after the $10,000 "bond" was handed over. The rental clerk identified petitioner as standing near the counter at the time the car rental agreement was signed.

2. Petitioner contends (Pet. 9-11) that apart from uncorroborated "admissions," there was no evidence to support a finding that any of the defendants had travelled in interstate commerce from Chicago, where the prosecution was venued, to Utah. We note first that his "uncorroborated admissions" objection is inapposite since the statements made to Thorn in the course of the extortion enterprise were not after-the-fact "admissions" to a law enforcement officer, which require corroboration.[3] They were, rather, part of the

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[3] *Warszower* v. *United States*, 312 U.S. 342, 347-348; compare *Opper* v. *United States*, 348 U.S. 84; *Smith* v. *United States*, 348 U.S. 147; *Wong Sun* v. *United States*, 371 U.S. 471, 488-489.

criminal transaction itself and were capable, independently, if credited, of providing sufficient proof that they had come from Chicago, where the underlying incident took place, and that they were in a hurry to "return" to that city. Accordingly, the court of appeals properly held that, on the basis of the statements made by petitioner and Pacewicz, the "jury could conclude that . . . [petitioner] had come from Chicago" (Pet. App. A. 8). There was, of course, further evidence on the interstate character of the crime: the rental and return of an automobile at the Salt Lake City airport, and the making of two long-distance telephone calls to the victim in Utah. Insofar as petitioner suggests that there was, at least, no basis for prosecution in Chicago because there was no evidence that he and Pacewicz had actually departed from that city to confront Thorn, he ignores the fact that the extortion plot unquestionably began with the carefully staged incident in Thorn's hotel room in Chicago, and under 18 U.S.C. 3237(a) any offense begun in one district and completed elsewhere may be inquired into and prosecuted, *inter alia*, where begun.[4]

3. Petitioner also makes the clearly untenable argument (Pet. 14-15) that Congress did not contemplate or intend that prosecution under 18 U.S.C. 1952

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[4] There is, therefore, in our view, no need to reach the alternative holding of the court below that the government's showing was at least sufficient to cause the burden of proof to shift to petitioner to disprove a fact peculiarly within his knowledge. Compare *Morrison* v. *California*, 291 U.S. 82; *United States* v. *Fleischman*, 339 U.S. 349.

"fluctuate" in accordance with the laws of the fifty states. It suffices to say that Congress itself has defined the reach of the statute as punishing interstate travel to promote a "violation of the laws of the State in which committed * * *." 18 U.S.C. 1952(b). The court below also correctly rejected the assertion that, so understood, Section 1952 is unconstitutional as attempting an impermissible delegation of power to the States or an unauthorized extension of federal jurisdiction into purely local affairs (Pet. App. A. 6-7). See, *e.g.*, *United States* v. *Zizzo*, 338 F.2d 577, 579-580 (C.A. 7), certiorari denied, 381 U.S. 915; *Turf Center, Inc.* v. *United States*, 325 F.2d 793, 795-796 (C.A. 9); *Spinelli* v. *United States*, 382 F.2d 871, 880 (C.A. 8), certiorari granted, 390 U.S. 942.[5] See, also, *United States* v. *Sharpnack*, 355 U.S. 286 (sustaining the Assimilative Crimes Act).

4. Petitioner's remaining contention, that the trial court erroneously instructed the jury that they were obliged to find that the Utah extortion statute was violated (Pet. 15-18), depends on giving a strained reading to words taken out of context. As the court below held (Pet. App. A. 10), the context demonstrates that the trial judge was merely giving a fair and accurate charge, at petitioner's request, on the theory of the defense.

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[5] Although the petition in *Spinelli* sought to raise the same attack on the constitutionality of 18 U.S.C. 1952 that petitioner here suggests (see petition in No. 801, O.T. 1967, pp. 32-33), this Court modified its order granting certiorari to limit review to the validity of the search and seizure involved in that case. 391 U.S. 933.

5. Finally, we point out that there would be no reason to hold this case pending a decision in *United States* v. *Nardello*, No. 51, this Term, probable jurisdiction noted, 392 U.S. 923. The issue in *Nardello* is whether 18 U.S.C. 1952 applies to extortionate conduct proscribed under a State statute labeled "Blackmail." As the court below noted (Pet. App. A. 1, n. 1), there has been no contention that the *Nardello* issue is presented here, since the Utah statute violated by petitioner is captioned "Extortion." See Title 76, Section 19-1 of the Utah Code.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys.

OCTOBER 1968.

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